Filed 7/20/15 P. v. Calderon CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW MICHAEL CALDERON, Defendant and Appellant.	G049641 (Super. Ct. No. 13CF0324) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Anthony Da Silva and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Andrew Michael Calderon of attempted automobile theft (Pen. Code, § 664, subd. (a); Veh. Code, § 10851, subd. (a); count 1) and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 3). (All further statutory references are to the Penal Code unless otherwise stated.) The court found true allegations Calderon had one prior serious felony conviction (§ 667, subd. (a)(1)), one "strike" prior under the "Three Strikes" law (§§ 667, subds. (d), (e)(1), 1170.12, subds. (b), (c)(1)), and that he had served a prior prison term (§ 667.5, subd. (b)). The sentencing enhancements arose out of a 2012 conviction for assaulting a peace officer (§ 245, subd. (c)).

Calderon received a total prison term of five years, consisting of the midterm of two years for count 1, which was doubled pursuant to the Three Strikes law, plus a consecutive one-year term for the prison prior. On count 3, the felony possession of a controlled substance conviction, the court imposed a concurrent two-year term.

Calderon argues Proposition 47, the Safe Neighborhoods and Schools Act (Prop 47) passed by voter initiative on November 4, 2014, applies retroactively to his felony conviction for possession of a controlled substance. He further argues this court must reclassify his felony conviction to a misdemeanor and release him with credit for time served.[1]

The Attorney General disagrees, asserting Prop 47 applies prospective only, and pointing out that Calderon had been convicted and sentenced before its enactment. However, assuming Prop 47 does apply to Calderon's case, the Attorney General also claims he is limited to seeking reclassification of the felony conviction and resentencing in the trial court.

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[1] Calderon initially claimed the court committed instructional error by failing to instruct on attempted joyriding as a lesser included offense of attempted vehicle theft. Calderon later conceded this issue by letter brief. However, we granted his concomitant request to file a supplemental opening brief raising the Prop 47 issue.

We conclude Prop 47 limits Calderon's remedy to filing a petition, or application in the trial court for reclassification of his felony conviction for possession of a controlled substance to a misdemeanor. (§ 1170.12, subds (a), (f).) Because Calderon does not challenge the sufficiency of the evidence to support either conviction, or the validity of any other aspect of the judgment, we affirm the judgment of conviction without prejudice to Calderon pursuing his postjudgment remedy.

FACTS AND PROCEDURAL HISTORY

The facts of the underlying crimes are not relevant to the issues discussed and may be briefly stated.

During the afternoon of January 30, 2013, Calderon got into Alejandro Sanchez's landscaping truck without permission. He tried to start the truck with the key Sanchez left in the ignition. Sanchez objected and Calderon got out of the truck, walked to a bicycle nearby, and rode the bicycle out of the neighborhood. Sanchez followed Calderon and called police. Police officers quickly found and arrested Calderon. He had 393 milligrams of methamphetamine in his pocket. During the booking process, Calderon spontaneously said, "the keys were already in the truck."

The judgment of conviction was entered November 25, 2013. On January 30, 2014, the court denied Calderon's motion to dismiss his strike for sentencing purposes (§ 1385) and imposed a five-year sentence. Calderon received 735 days presentence credits. He filed a notice of appeal on February 3.

DISCUSSION

Prop 47 amended various provisions of the Penal and Health and Safety Codes to reduce specified drug and theft offenses to misdemeanors unless the crime is committed by an ineligible defendant. (*People v. Lynall* (2015) 233 Cal.App.4th 1102,

1108.)[2] Health and Safety Code section 11377 was one of the amended sections. If Prop 47 applies to defendant's case, he would be entitled to resentencing if he has no disqualifying prior convictions.

The problem is section 3 states "no part of [the Penal Code] is retroactive, unless expressly so declared." Prop 47 passed after conviction and sentence, but while defendant's appeal was pending. Nevertheless, to counter the statutory preference for prospective only application, Calderon cites the equal protection principles set forth in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

In *Estrada*, the California Supreme Court held, "A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Estrada*, *supra*, 63 Cal.2d at p. 745.) Changes that lessen punishment for a crime are presumed to apply in all cases not reduced to final judgments as of the act's effective date. (*Id*. at p. 746; *People v. Floyd* (2003) 31 Cal.4th 179, 184.) Under the *Estrada* rule, a legislative amendment that lessens criminal punishment is presumed to apply to all cases not yet final. (*Estrada*, at pp. 742, 745, 748.) That is, unless the Legislature specifically states otherwise by including a "saving clause" providing for prospective application. (*Ibid*.)

Acknowledging the absence of an express saving clause in Prop 47, the Attorney General relies on *People v. Yearwood* (2013) 213 Cal.App.4th 161 (*Yearwood)*, to argue section 1170.18 acts as the functional equivalent of a savings clause for Prop 47.

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[2] "Proposition 47: (1) added Chapter 33 to the Government Code (section 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377. [Citation.]" (*People v. Lynall*, *supra*, 233 Cal.App.4th at p. 1108.)

Yearwood addressed the retroactivity of Proposition 36, which amended the Three Strikes law so that an indeterminate life sentence may only be imposed where the offender's third strike is a serious and/or violent felony or where the offender is not eligible for a determinate sentence based on other disqualifying factors. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); see also *Teal v. Superior Court* (2014) 60 Cal.4th 595, 596.) The *Yearwood* court concluded section 1170.126 acted as a saving clause that took Proposition 36 out of the *Estrada* rule.

Other intermediate courts have disagreed with *Yearwood* on whether the mandatory second-strike sentencing provisions of Proposition 36 apply to all qualifying third-strike convictions which were not yet final on November 7, 2012. The issue is before the California Supreme Court. (See, e.g., *People v. Conley*, review granted Aug. 14, 2013, S211275 [Reform Act is not retroactive]; *People v. Lewis*, review granted Aug. 14, 2013, S211494 [Reform Act applies retroactively]; *People v. Lester*, review granted Jan. 15, 2014, S214648 [Reform Act does not apply retroactively].)

In the meantime, we find two of published cases addressing Prop 47, *People v. Noyan* (2014) 232 Cal.App.4th 657 (*Noyan*) and *People v. Shabazz* (2015) 237 Cal.App.4th 303 (*Shabazz*), instructive.[3]

The defendant in *Noyan* pled guilty to violations of Health and Safety Code section 11370 (possession of a controlled substance) and other crimes. The appellate court primarily discussed equal protection in light of two statutes prohibiting the unlawful introduction of alcohol and controlled substances into county jail. However, on petition for rehearing, the defendant also argued the appellate court should reduce his convictions from felonies to misdemeanors pursuant to Prop 47's amendment to Health and Safety Code section 11350, subdivision (a).

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[3] *Noyan* was filed after Calderon's supplemental opening brief. The Attorney General's supplemental respondent's brief cites the case, but Calderon neither cites nor discusses this case in his reply brief.

Without analysis, the *Noyan* court stated defendants like Noyan, i.e., those with pending appeals from convictions and sentences entered before passage of Prop 47, must pursue a reduction of a felony conviction to a misdemeanor according to the statutory remedy of petitioning for recall of sentence in the trial court once his judgment is final pursuant to section 1170.18. (*Noyan*, *supra*, 232 Cal.App.4th at p. 672.) *Noyan* cited *Yearwood*, *supra*, 213 Cal.App.4th at pages 170, 177, but there was no mention or discussion of the Supreme Court's *Estrada* rule. The *Noyan* court simply directed the defendant to file a petition in superior court pursuant to section 1170.18.

In *Shabazz*, the defendant pled no contest to two felonies, methamphetamine possession (Health & Saf. Code, § 11377, subd. (a)) and receiving stolen property (§ 496, subd. (a)), on March 21, 2014. He was sentenced to two years in jail, received credit for 272 days of presentence custody, and completed his sentence on September 24. (*Shabazz*, *supra*, 237 Cal.App.4th 303.) Thus, the voters approved Prop 47 after Shabazz pled no contest and the court imposed sentence, but while his appeal was pending. (*Ibid*.)

The *Shabazz* court framed the retroactivity question as one of voter intent. (*Shabazz*, *supra*, 237 Cal.App.4th at p.312.) "[T]he issue is whether the electorate intended the amendatory provisions of Proposition 47—reducing defendant's crimes from felonies to misdemeanors—to be automatically applied on appeal." (*Ibid.*) The court noted the lack of an express saving clause, and went on to observe that section 1170.18, subdivision (f) "expressly, specifically and clearly address the application of the reduced punishment provisions" to defendants with pending appeals.

As the *Shabazz* court observed, "The plain meaning of the language in section 1170.18 is this—the voters never intended that Proposition 47 would automatically apply to allow us to reduce defendant's two felonies to misdemeanors. Rather, the voters set forth specific procedures for securing the lesser punishment to eligible persons such as defendant." (*Shabazz*, *supra*, 237 Cal.App.4th at p. 313.)

The *Shabazz* court then identified the two ways a defendant "sentenced or placed on probation prior to Proposition 47's effective date" can have his or her sentence for an enumerated felony reduced to a misdemeanor. (*Shabazz*, *supra*, 237 Cal.App.4th at p. 313.) "First, pursuant to section 1170.18, subdivision (a), the defendant may file a *petition* [in the sentencing court] if she or he is currently serving a felony sentence for an enumerated offense." (*Id*. at p. 310; § 1170.18, subd. (a), italics added.) "Upon filing the petition, the trial court proceeds in compliance with section 1170.18, subdivision (b)." (*Shabazz*, at p. 310, fn. omitted.)

On the other hand, "if a defendant has completed his or her sentence for an eligible conviction, . . . of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an *application* before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f).) "Section 1170.18, subdivisions (f) through (g) specify the defendant must file an application and describes a procedure for the trial court to rule upon it." (*Shabazz*, *supra*, 237 Cal.App.4th at p. 310, italics added.) Thus, as the *Shabazz* court observed, "the voters intended there be specified retroactive application of the mitigating sentencing provisions of Proposition 47 for an accused sentenced prior to its effective date." (*Id.* at pp. 309-310.)

We agree with the *Noyan* and *Shabazz*. (See also *People v. DeHoyos* (June 30, 2015, D065961) __ Cal.App.4th ___[2015Cal.App. Lexis 582]; *People v. Lopez* (June 29, 2015. H040726) __ Cal.App.4th __[2015 Cal.App. Lexis 571].) Calderon's remedy is in the superior court. He must file either a petition or application, depending upon whether he is currently serving, or has completed, the sentence for possession of a controlled substance. He will receive the ameliorative effect of Prop 47 "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b); see also *People v. Lynall*, *supra*,

233 Cal.App.4th at p. 1109.)[4] Calderon's conviction and sentence for attempted automobile theft is unaffected by Prop 47.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.

[4] As used in section 1170.18, "an 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony . . . ." (§ 1170.18, subd. (c).)